89-967(1)

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

GIRISH J. MODI
Petitioner

vs.

CHANDRA MODI
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO, SAN FRANCISCO, CA 94102

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner should be allowed to produce additional evidence under Rule 23(b) of California Rules of the Court and/or Section 909 of Code of Civil Procedures for State of California

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Girish J. Modi, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Two entered on August 4, 1989.

OPINION BELOW

The Court of Appeal of the State of California entered its decision denying Petitioner's request to allow evidence under Rule 23(b) of Califronia Rules of Court. A copy of the decision is attached herewith as Appendix - B.

JURISDICTION

Petitioner's request for review of Appeal Court's decision was also denied by the Supreme Court of California on October 11, 1989. A copy of Supreme Court of California's denial is attached herewith as Appendix - C.

The jurisdiction of this Court is evoked under the United States Constitution, Amend. V.

STATEMENT OF THE CASE

In its statement of decision, the Appeal Court for State of California states the following:

"..Also, by asking to produce the evidence for the first time at oral argument, husband gave no notice to wife or this court what his evidence would be, making any advance ruling on the matter impossible, not to mention unfair to wife. Also, Rule 23(b) requires a showing that the new evidence could not have been produced for trial. Husband makes no such showing.."

Petitioner brings to the attention of this Court that he is not an attorney and he is not familiar with technicality of rules. His sole purpose of appeal is to seek proper justice for himself. He did submit his formal motion** to the Appeals Court 30 days prior to the hearing but it was flatly denied. Also, during the oral argument he begged the Appeal's Court to allow

**see Appendix A

him to produce this evidence and explained why he could not produce it in the lower court; but the judges denied his plea. Petitioner believes that the superior court judge had a sympathy for ex-wife Chandra and the Appeals Court continued this sympathy towards her thus doing improper favor to her.

Petitioner had explained in his motion (see Appendix - A) to produce new evidence that the recorded tape containing conversation which took place just before their split-up in August 1984 between him and his ex-wife Chandra was discovered in February 1989, long after the superior court rendered its judgment. He also stated his reason for not producing this tape at the trial that the tape was stored along with his other possession in a public storage in State of Washington from January 1985 to December 1988 and was inaccessible as Petitioner was moving from place to place on account of short term jobs

since December 1984. Therefore this tape was discovered in February 1989, long after the case in the lower court was tried, when he transferred his personal effects after closing the storage space.

In this recorded conversation Respondent Chandra explictly acknowledged that the monies advanced by Petitioner were indeed loans at 14% interest and she would return them in small installments.

Petitioner believes that Appeals Court is afraid to allow this evidence as it would force them to reverse the judgment which will harm Chandra for whom they have sympathy since she is a woman.

But Petitioner has a right to proper justice under the provision of United States Constitution, Amendment V. Therefore, it should be noted that Petitioner (husband) is not an attorney and he should not be expected to know the rules in detail as long as he makes his point

clearly understandable to the Court.

REASONS FOR GRANTING THE WRIT

Rule 23(b) and Code of Civil Procedure Section 909 for the State of California authorize an appellate court to receive evidence outside the record and make either new findings or findings contrary to ones made below provided that this new evidence either affirms the judgment or reverse with directions to enter judgment for the appellant. (Estate of Schluttig (1950) 36 Cal.2d 416, 422.)

In order to give a fair trial to the Petitioner, the Court must put aside all the technicality of rules and then allow Petitioner to play this recorded conversation in an open court and to prove that Respondent Chandra had won the case in lower court by lying and misleading the judge. In other words, Respondent Chandra and her previous husband

Ghosh had given false testimonies on August 13, 1986 and the Judge had believed their testimonies and disregarded two I.O.Us. produced by Petitioner while giving his judgment. Petitioner has voiced his voluminous objections to Judge's decision but it is falling on deaf ears.

CONCLUSION

For the foregoing reasons, Petitioner Girish J. Modi firmly believes that if he is given one chance by allowing him to produce this recorded conversation as evidence, the judgment will be reversed in his favor. $13,000 is no small amount for him to lose.

Petitioner hopes that the Supreme Court of the United States will listen to his plea and give him a chance for a fair trial.

Respectfully submitted

Girish J. Modi
Petitioner, Pro Persona

APPENDIX

APPENDIX A

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

Girish J. Modi,
Appellant

v.

Chandra Dey Modi,
Respondent

No. A041247

APPELLANT'S NOTICE TO PRODUCE EVIDENCE

In accordance with Rule 23 (b) of California Rules of Court, Appellant Girish Modi hereby files this notice to produce evidence.

Since the Petition for Appeal was filed more than a year ago, Appellant has received additional evidence which will throw more light on the issues to be resolved and will also convince the Court that Respondent/Chandra and her previous husband Ghosh had lied during their testimonies on August 13, 1986.

Appellant therefore requests this Court of Appeal to allow him to produce this evidence on the day of oral argument.

Dated: June 4,1989 - Girish J. Modi
Appellant

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA, FIRST APPELLATE DIST

DIVISION TWO

In re the Marriage of
CHANDRA and GIRISH J. MODI

CHANDRA MODI,
Respondent A041247

v.

GIRISH J. MODI, (Alameda County Sup.
Appellant Ct.No. H-107203-9)

Girish J. Modi appeals from an order of the superior court denying his claims for reimbursement of $13,000 in alleged loans of community funds to wife Chandra Modi during marriage.[1] In a revised statement of decision issued after a contested trial, the court found that the claimed loans were in fact gifts. We will affirm the order and deny a motion to take additional evidence on appeal.

1/ We refer to the parties as husband and wife for convenience, while recognizing that their marital status was terminated by an order not at issue here.

BACKGROUND

The parties married in July 1983 and separated in December 1984. This case concerns two transfers of money from husband during that period.

The first was an August 1983 check for $5,000 which wife deposited in a joint account and then used to pay off her share of an obligation secured by a townhouse condominium, her separate property, in Union City. (In husband's view she used the money to finance a trip and other expenses.) The second transfer was a check for $8,000 written by husband in May 1984 from a Boston account. He made the check out directly to wife's former husband, Sukanta Ghosh, and it extinguished a debt which wife owed Ghosh from the dissolution of that marriage. In response, Ghosh executed and delivered to wife a recorded quitclaim deed of all interest in a house in Union City (wife's separate property) which he and she had purchased during the prior marriage.

By stipulation, the proceedings below were

confined to characterizing the two transfers. Evidence was taken from court proceedings extending over widely separated dates -- August 13,1986, February 10 and 11, 1987 and August 19, 1987. The matter was deemed submitted after an opportunity for both parties to review transcripts and provide written closing arguments. Husband filed voluminous objections to a statement of decision filed in December 1987.

A revised statement of decision and an "Order After Decision" were subsequently filed in January 1988, and it is from the order that husband appeals. (Each party is acting in propria persona on appeal).

DISCUSSION

I

The trial court applied the familiar rule that a husband's use of community property funds to improve a wife's separate property is presumed to be a gift to the wife and thus gives the husband no right to apportionment or reimbursement. (In re Marriage of Camire (1980) 105 Cal. App. 3d 859, 866-867) The court found insufficient evidence to rebut the presumption in this case -- that is, no evidence of a common understanding, communicated intention or express agreement that the transfers were not gifts.

Husband attacks that determination, pointing to certain circumstances that might support a contrary determination. We reject his argument for several reasons.

First, he tries to reargue his case, essentially

urging us to disagree with the trial court's factual findings about the parties' intent. We have no power to reweigh the evidence or to reassess the credibility of witnesses, even if we were inclined to disagree with the findings. We may reverse only if there is no substantial evidence. "'The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicated or uncontradicated which will support the finding of fact.' (Citations)" (Forman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875,881.)

Second, in applying that standard, we "'must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. (Citation) (In re Marriage of Fink (1979) 25 Cal. 3d 877,887)

Husband "cites only evidence favorable to his position, ignoring all the contrary. Such briefing is manifestly deficient." (Ibid.) We deem the issue waived for this reason.

Third, a problem related to the second is that husband often fails to cite transcript references and utterly fails to identify or support a legal issue in this brief, both of which defects violate rule 15(a) of the California Rules of Court (hereafter cited only by rule). This court has no duty to "comb the record" on husband's behalf. (In re Marriage of Fink, supra , 25 Cal. 3d at p.888; see Berger v. Godden (1985) 163 Cal. App. 3d 1113, 1117-1118.) Husband does not cite a single case, statute or other authority. He thus waives his claim for this reason as well.

Fourth and finally, much of the evidence to which he refers apparently was never placed in evidence in the court below. Some of it appears to be entirely outside the record, and some of it, while included in the record as attachments or exhibits to various findings, was never placed or formally

offered in evidence. It was therefore never considered by the trial court. As a general rule, matters not presented by the record and considered by the trial court may not be considered on appeal. (In re Rogers (1980) 28 Cal.3d 429, 437, fn. 6; Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 184, fn. 1.)

Tacitly recognizing that some matters are outside the record, husband seeks leave to produce additional evidence at oral argument under rule 23(b). We deny the request. While rule 23(b) and Code of Civil Procedure section 909 authorize an appellate court to receive evidence outside the record and make either new findings or findings contrary to ones below, the power is exercised only in situations where it allows the court to (1) affirm the judgment or (2) reverse with directions to enter judgment for the appellant. (Estate of Schluttig (1950) 36 Cal. 2d 416, 422.) It is not a substitute for a motion for new trial based on newly discovered evidence, which must be made in

the trial court, and it is never used where the new evidence would only add to conflicting evidence already in the record. (Id., at p.423)

Also, by asking to produce the evidence for the first time at oral argument, husband gave no notice to wife or this court what his evidence would be, making any advance ruling on the matter impossible, not to mention unfair to wife. Also, rule 23(b) requires a showing that the new evidence could not have been produced for trial. (Estate of Schluttig, supra , 36 Cal. 2d 416,423) Husband makes no such showing.

Next, accepting husband's representation that the new evidence will " throw more light on the issues" and convince us that wife and Ghosh "lied during their testimonies" (sic), it appears that the evidence would not compel a reversal of the judgment with directions , as it must be in order for rule 23(b) to apply. (Id. at p. 422) There was direct evidence in this case, from wife and Ghosh, that husband gave Ghosh the check for $8,000 as a surprise

gift to wife, asked Ghosh for a quitclaim deed (in wife's name alone), and never made any claim that it was a loan until later, when the parties were on the verge of separation and wife had asked him to leave the house. The court impliedly found that to be credible testimony. All of the "evidence" to which husband points, whether considered below or not, is just conflicting circumstantial evidence. Receiving more such evidence would still leave a conflict in the record and substantial evidence to support court's finding. The same is true as to the $5,000 check. Wife testified that, although husband didnot tell her what the money was for, it was her understanding that the money was not to be repaid, and husband did not claim otherwise until the breakup was imminent. Husband's new evidence would only add to contrary inferences in the record and would not be dispositive.

II.

Husband urges that the superior court should have initiated "felony charges" against wife

for having given false testimony, having intimidated a witness (Ghosh) and having concealed evidence. He apparently challenges a portion of the order which denied his motion to file an amended response and attempt to initiate felony charges against wife.

Error has not been shown. Husband calls our attention to asserted contradictions and inaccuracies in wife's testimony (mostly without citing the record). However, he offers no legal argument why the court should have granted his motion. We deem the point abandoned. (Berger v. Godden, supra, 163 Cal. App. 3d 1113, 1119 - 1120 & fn. 7.)

III

Wife, unrepresented and apologizing for not knowing how to bring a "technically correct" motion, asks that we dismiss the appeal as a sanction for husband failing to identify legal issues, violating rule 15(a), and taking this appeal solely to harass her and cause her legal exppenses.

We deny the motion. Unless an appellant has first failed to correct briefing defects after being ordered to do so (see rule 18), dismissal is not a proper sanction for violating rule 15(a). (Berger v. Godden, supra , 163 Cal. App. 3d 1113, 1118-1119.) Husband has not been ordered to correct his brief.

Apart from rule 15(a), failure to "articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal justifying dismissal." (Id. at p. 1119), and we have concluded above that husband has abandoned his arguments in this way. However, in view of both parties' unrepresented status and wife's own failure to cite authority for this motion, it would be inequitable to order dismissal. Also, failing to offer legal argument does not automatically render an appeal "frivolous", and thus sanctionable, in the legal sense. (Id., at p. 1120; rule 26(a); code civ. Proc., Article 907; In re Marriage of Flaherty

(1982) 31 Cal. 3d 637, 649 - 651.)

On the question of harassment, wife has furnished us with a February 1988 declaration from trial counsel indicating that husband admitted, during the proceedings below, trying to harass her with legal expenses. However, the declaration is not included in the appellate record, and the copy furnished to us does not bear a file-endorsed stamp to show that it is on file below. In any event, wife is acting on her own behalf and clearly has not incurred major legal expenses in defending this appeal.

Dismissal is denied. Any burden on wife is lessened by the fact that husband, as the unsuccessful party, will have to bear the ordinary costs on appeal as provided by rule 26.

DISPOSITION

The judgment is affirmed.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
First Appellate District, Division Two

No. A041247
S011707

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re MARRIAGE OF CHANDRA AND GIRISH J. MODI

CHANDRA MODI, Respondent

v.

GIRISH J. MODI, Appellant

Appellant's petition for review denied.

Acting Chief Justice